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# Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections

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## ARTICLE

# DEVELOPING A CONSENSUS OF CONSTRAINT: A JUDGE'S PERSPECTIVE ON JUDICIAL RETENTION ELECTIONS

JOSEPH R. GRODIN\*

The events surrounding the 1986 judicial retention elections in California have helped to stimulate public and academic debate concerning the role of courts in a democratic society and the implications of that role for the manner in which decisions are made concerning the selection and retention of judges. Since I was a participant in that election, and owe my present relative leisure to its outcome, I recognize that my objectivity concerning both of these questions is suspect. On the other hand, precisely as a result of my experiences as a judge and as a judicial candidate I may have observations and insights which will prove useful to others. I leave that judgment, and the necessary discounting for bias, to the reader.

I intend to limit my Commentary to the context of my own experience, which involves the state appellate courts and a system of retention elections such as exists in California. It is possible that my observations have broader application, but there are significant differences, for example, between the roles of state and federal courts—particularly the United States Supreme Court, which attracts most of the academic and public attention—that seem to me relevant to the issues deserving consideration. In addition, evaluating the procedures and criteria appropriate to the initial appointment and confirmation of a judge may involve different considerations than are relevant when the question is whether or not

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a judge should be retained in his position after some period of service. Contested judicial elections, in which an incumbent is opposed by an alternative candidate are likewise beyond the scope of my commentary. Sufficient unto the day the evil thereof.

## I

A bit of history is useful for understanding the system under evaluation.<sup>1</sup> During the colonial period, King George III retained and exercised the power to appoint and remove judges. This power was so deeply resented by the colonists that the Declaration of Independence lists among its grievances the fact that the King "has made judges depend on his will alone, for the tenure of their offices, and the amount and payment of their salaries."<sup>2</sup>

Determined to avoid undue executive influence over the judiciary, eight of the original thirteen states provided in their constitutions for selection of judges by one or both houses of the legislature,<sup>3</sup> and the remaining five states qualified executive appointment by insisting upon concurrence by the Council.<sup>4</sup> In order to protect judicial independence, a majority of the states provided for lifetime appointments, subject to good behavior.<sup>5</sup> Popular elections for judges were unheard of.

The beginning of the nineteenth century witnessed something of a popular revolt. Judges, who had never been very popular as a group, became even less so.<sup>6</sup> Thomas Jefferson, as President, had engaged in

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1. For a more detailed historical treatment, see generally S. CARBON & L. BERKSON, *JUDICIAL RETENTION ELECTIONS IN THE UNITED STATES* (1980); E. HAYNES, *THE SELECTION AND TENURE OF JUDGES* (1944); A. VANDERBILT, *THE CHALLENGE OF LAW REFORM* (1955); Nelson, *Variations on a Theme-Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4 (1962); Smith, *The California Method of Selecting Judges*, 3 STAN. L. REV. 571 (1951). For an extensive bibliography on the subject of judicial selection and retention, see *LITERATURE ON JUDICIAL SELECTION* (Chinn & Berkson eds. 1980).

2. A. VANDERBILT, *supra* note 1, at 14 (quoting The Declaration of Independence para. 9 (U.S. 1776)).

3. These states included Connecticut, Delaware, Georgia, New Jersey, North Carolina, Rhode Island, South Carolina, and Virginia. A. VANDERBILT, *supra* note 1, at 14 n.8.

4. *Id.* In New Hampshire and Pennsylvania, appointment was by the executive in conjunction with the Council. In Maryland, Massachusetts, and New York, the Council's consent was required. *Id.* at 14 nn.4-5.

5. Eight states—Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina, South Carolina, and Virginia—provided for lifetime appointments. *Id.* at 14 n.8. Three states—Connecticut, New Jersey, and Pennsylvania—provided for fixed terms. *Id.* at 14 n.9. In Georgia, judges served at the pleasure of the legislature, *id.* at 14, and in Rhode Island, no term was specified.

6. For an analysis of some of the factors underlying that unpopularity, see E. HAYNES, *supra* note 1, at 90-101.

vehement attacks on Federalist judges whom he regarded as intent upon blocking the program of the new Democrats.<sup>7</sup> Andrew Jackson, as President, was the flag bearer of a new populism that preached voter control over all aspects of government, including the judiciary.<sup>8</sup>

In response to these political movements, most states which had provided for appointment of judges with lifetime tenure amended their constitutions to provide for selection of judges through either election or appointment. The judges would be awarded fixed terms subject to elections in which the incumbent judge could be challenged by an opponent on the ballot.<sup>9</sup> New states, as they were admitted to the Union, typically adopted this populist model without much discussion. California, through its Constitution of 1849, was one such state.<sup>10</sup> However, the pendulum then swung again. The elections in most states were partisan affairs in which party politics played a substantial role. The system was criticized in various quarters as being inconsistent with the standards of quality and independence expected of the judicial branch,<sup>11</sup> and a search began for alternatives.<sup>12</sup>

One obvious alternative was the federal model, but that was a hard sell politically in light of the still widespread conviction that judges should be subject to some form of "accountability," and so a third model was put forward. This model called for judges to stand for periodic retention elections in which the voters would have an opportunity to vote simply "yes" or "no." If the judge received a majority of "yes" votes he stayed; if not, he left.<sup>13</sup>

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7. *Id.* at 93. Before he became President, Jefferson favored lifetime appointments for judges. However, after the decision in *Marbury v. Madison*, he declared it was "a misnomer to call a government republican in which a branch of the supreme power is independent of the nation." *Id.* Jefferson also called for a constitutional amendment limiting judges to six year terms. *Id.* at 93-94.

8. According to Haynes, while there were particular grievances against the judiciary, the "fundamental causes of that change had very little to do with the relative merits of this or that system of judicial selection and tenure, but were rather the ideas and impulses of a violent swing toward the democratization of government generally." *Id.* at 100.

9. This change was swift and spectacular. Within 10 years following New York's shift to an elective system in 1846, 15 of the 29 states in existence in 1846 had amended their constitutions to provide for popular election of judges. *Id.*

10. CAL. CONST., art. VI, § 2.

11. This criticism was led by Roscoe Pound in his famous 1906 speech, "The Causes of Popular Dissatisfaction with the Administration of Justice." For the complete text of this speech, see 46 J. AM. JUDICATURE SOC'Y 55-62 (1962).

12. In 1913, the American Judicature Society was founded. The Society's main purpose was to address the subjects of judicial selection, tenure, and retirement. Nelson, *supra* note 1, at 17.

13. The retention election alternative was apparently first proposed by Albert M. Kales, one of the founders of the American Judicature Society, in the context of a broader plan advocating merit selection. Carbon & Berkson, *supra* note 1, at 2-4.

California was the first state to adopt the retention election system, although it did so only for appellate judges.<sup>14</sup> The change came about in 1934 through an initiative measure principally sponsored by the Commonwealth Club of San Francisco, a conservative Republican organization, and the state Chamber of Commerce.<sup>15</sup> The Commonwealth Club supported the initiative claiming that it would insulate judges from the political pressures of certain groups that might dissuade them from firmly but fairly enforcing the criminal laws of the state.<sup>16</sup> In other words, it was essentially a law and order campaign: if you want to make sure that the bomb throwers get what's coming to them, give judges the independence they need to enforce the law. The principal opposition to the measure came from the San Francisco Central Labor Council, which argued that contested judicial elections were necessary in order to keep judges responsible to the people.<sup>17</sup>

The criteria that the voters are supposed to bring to bear in such a retention election is not a matter of recorded discussion, and nothing in the constitutional provision itself prescribes any such criteria. Therefore it could be argued, as it was by some commentators during the 1986 election campaign, that the voters are free to select any criteria that they consider to be appropriate. In a sense, that is true; when voters go into the polling booth, they are not required to provide any explanation for their votes. However, the same is true in a recall election, and there we seem to have a consensus that the decision whether to recall an elected official calls for a different, and more focused, judgment than the decision to elect that official in the first place.

There is no comparable consensus with respect to judicial retention elections. Perhaps the reason for this is that, until fairly recently, such elections were political non-events to which no one gave much serious thought. It is time that this attitude be changed, and this Symposium provides a welcome opportunity.

## II

I agree with the premise of the Symposium that if consensus is to be sought regarding the criteria applicable to judicial retention elections, or with respect to the desirability of a system which includes such elections, one must start with notions of the judicial function and the relationship

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14. The history of the 1934 amendment is set forth in Smith, *supra* note 1, at 573-86.

15. *Id.* at 573-74.

16. *Id.*

17. *Id.*

of that function to the democratic process. As I shall explain, however, such notions are useful primarily at the extreme ends of a spectrum which views judges as being, on one hand, subject to total constraints and, on the other, open to total discretion. If one believes, as I do, that most of what appellate judges do falls somewhere in the middle of that spectrum, then the niceties of adjudicatory theory become less important in reaching a consensus than the practicalities of judicial elections.

If, for example, we all viewed the judicial process as operating within a closed system of rules which are in some manner discoverable by judges, and capable of supplying the answers to legal questions without the exercise of the judges' discretion, then consensus as to judicial retention elections would in principle be quite easy. If judicial elections were to be employed at all, public evaluation would focus upon how competently the judges performed the task of discerning and applying the appropriate rules and perhaps upon how well they performed the task of elucidating their application of those rules in particular cases. More likely, however, it seems that we would agree that we ought not to have elections for judges at all, any more than we have them for brain surgeons or engineers. Instead, we should establish tribunals that have the expertise to assess judicial competence more readily than the electorate at large. After all, if judges are "the living oracles" of the law,<sup>18</sup> mere mortals should not interfere with their oracular vision.

Perhaps today no one knowledgeable in the law accepts this formalistic view of judicial omnipotence—if, indeed, anyone ever did—although one encounters it quite frequently in popular parlance.<sup>19</sup> In some respects, however, Dworkin's theory of the law as a system of rules supplemented by principles which are capable of being discovered and applied without discretion on the part of the judge<sup>20</sup> is itself a formalist premise that should yield the same conclusions with respect to judicial elections. Few of us would want to assume responsibility for evaluating the performance of Dworkin's "Hercules."<sup>21</sup>

At the other end of the spectrum is the view that judicial decisions ultimately represent nothing but the personal predilections or political inclinations of judges, subject at most to the kinds of constraints which

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18. 1 W. BLACKSTONE, COMMENTARIES 69 (Dawsons of Pall Mall ed. 1966).

19. There were times during the 1986 election campaign when supporters of one or more of the incumbent justices articulated a formalist, or mechanistic, view of the judicial process in order to bolster an argument against voter intervention. My impression is that most voters regarded that view as overly simplistic, and thus rejected it.

20. R. DWORKIN, TAKING RIGHTS SERIOUSLY 31-39 (1977).

21. *Id.* at 105-30.

may be said to operate upon a principled legislator, but nothing more. Some of the Legal Realists came close to this position in their more vigorous commentaries,<sup>22</sup> and more recently certain of the Critical Legal Studies commentators have continued that tradition.<sup>23</sup> If we were to accept this principle of indeterminacy in its purest form, then again it should be relatively easy to achieve a consensus. If we accepted the premises of representative democracy, judicial elections would be embraced with enthusiasm. If it is a good thing to have elections for legislators, and if what judges do is indistinguishable from what legislators do in any relevant way, then there is hardly room for argument on the subject. We would vote for or against judges on the ballot using essentially the same criteria used in voting for or against a candidate for legislative office. However, in the absence of an opponent, we would have to make a prediction as to whether the governor likely to be chosen by the people in the same election would appoint a replacement more likely to vote for results more acceptable to our respective points of view. The political equation might be difficult to solve, but as to the identity of the factors there would be little doubt.

The problem is, neither of these models describes more than a small fraction of the judicial function. Judges are often faced with cases—perhaps they are “easy” cases, though in psychological terms the opposite is often true—in which a particular answer seems to be compelled by the clear language and context of a constitutional or statutory provision or a common law rule. I don’t mean compelled in a logical sense. I mean compelled in the sense that any judge would feel like a damned fool trying to justify a different result. Not infrequently, the result that a judge feels compelled to reach is not one of which he is enamored. I have cast my vote as a judge to apply statutes I would never have voted for as a legislator, in some cases to reach results that were counter to my own views of wise public policy. I have written or joined opinions which applied initiative measures that I considered to be unwise and which I voted against when they were on the ballot. I have joined in the enforcement of administrative decisions that I would not have supported as an

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22. See, e.g., J. FRANK, *LAW AND THE MODERN MIND* 108-17 (1936) (taking the view that judicial decisions are simply a product of the judge’s personality).

23. See, e.g., Tushnet, *Constitutional Interpretation and Judicial Selection: A View from The Federalist Papers*, 61 S. CAL. L. REV. 1669 (1988). During the 1986 California judicial campaign there were editorial writers and politicians who advanced such a view as a means of justifying opposition to one or more of the judicial candidates. Unlike the opposite view, which I think found little support, this resonated with considerable credibility. I have referred to it in my speeches as the “chocolate ice cream theory of jurisprudence”: some judges like chocolate, others vanilla. *De gustibus non disputandum est*.



administrator. As a judge on the intermediate appellate court, I followed common law precedents that I would have preferred to overrule. I have written opinions one way, only to be persuaded by a carefully crafted dissent that, as a matter of legal principle, I was wrong. Undoubtedly some judges do this sort of thing more often than others, but all judges do it sometimes. At least to this extent, the model of the judge-as-legislator has got to be wrong.

That the older, formalist model of the judge-as-oracle is also inadequate requires, I would suppose, no argument today. I would argue that Dworkin's modern version of that model—the judge as Hercules, eschewing all “policy” judgments, and searching out and applying objectively ascertainable “principles” inherent in the institutions and enactments of society<sup>24</sup>—is similarly flawed. That argument can be, and has been, made most forcefully by persons more skilled in legal philosophy than I am, but let me add this by way of personal testament. I fully accepted, as a judge, that there were many cases in which a proper decision called for some assessment as to the likely consequences upon society or the legal system of the various options available to the court (what Dworkin calls a “policy” determination), and I doubt there is a judge on the American bench who thinks otherwise. In the domain of moral judgments (what Dworkin calls “principle”), insofar as the two are distinguishable, I have yet to find that degree of objectivity which, according to Dworkin, avoids the exercise of true discretion. I am willing to accept that this may be because I am not Hercules, but I have yet to encounter him either. I would argue that in most of the cases that come before the highest court of a jurisdiction there are difficult “policy” or “principle” choices to be made, and it is both predictable and unavoidable that a judge's background, value system, and philosophy will play some part in the making of those choices.

This observation hardly requires us to swing to the opposite end of the legal-philosophical spectrum. Even in the “hard” cases, there are constraints which create distance between the judicial and legislative functions. Judges do not simply vote for or against a particular result; they write or join in an opinion which seeks to justify that result in relation to existing norms and provide a principled basis for deciding other similar cases in the future. Judges are not free to interpret an ambiguous statute simply in accordance with their own views of public policy; they are obligated to take into account the policies reflected in the statute's enactment and its legislative history. Even in the arena of the common

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24. See *supra* note 17.

law, judges do not have a free hand. They write against a background of other common law decisions, to which they have an obligation of coherence, and against the background of statutory enactments, which may reflect legislative policies deserving of recognition. Principles may not bear the objectivity which Dworkin assigns them, but there are common customs, understandings, and value judgments which judges are expected to take into account and be limited by, rather than resorting to purely idiosyncratic predilections in the decision of a case.

A proper, although concededly imprecise, view of the judicial process is one which recognizes that judges with diverse outlooks perform many different tasks in an enormous variety of factual and legal contexts, making generalization about the nature of adjudication extremely difficult. Some of what judges do is subject to rather rigid control by rule; some of what they do is very close to legislation; most of what they do takes place in a middle ground, in which the tension between constraint and discretion, between the objective and the subjective, is always present, always a matter of degree, likely to be perceived differently by different judges, and incapable of either quantification or categorical description. This may not be a satisfactory description for those who seek precision in such matters. However, as Justice Cardozo said after a similarly ambiguous description of the judge's role: "If this seems a weak and inconclusive summary, I am not sure that the fault is mine."<sup>25</sup>

### III

If the reader is prepared to accept my somewhat open-ended statement of the middle ground, there remains to be considered its implications for the subject under review. Let us examine, then, in light of what I would call a truly realist view of the judicial process, what advice we would give voters regarding the criteria to which they should look in deciding how to cast their ballots in a pending judicial retention election.<sup>26</sup> I put the matter this way because I think we need to focus upon

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25. B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 162 (1921).

26. The debates over the 1986 judicial elections in California inspired a variety of decision models by scholars and commentators. See Bice, *Four Tests to Judge the Justices*, USC LAW 1, 1-2 (Fall-Winter 1986) (setting forth, but not advocating, four models that voters might apply: the "initial appointment" model; the "agreement with decisions" model; the "conformity with judicial role" model; and the "renovable offense" model); Chemerinsky, *Assuring Judicial Independence*, USC LAW 44, 44 (Fall-Winter 1986) (advocating an impeachment model, in which the test is whether the judge acted outside the proper role of a judge); Simon, *Democracy, Constitutional Law and the California Supreme Court's Death Penalty Decisions*, USC LAW 28, 28 (Fall-Winter 1986) ("bend-over-backwards" model, with a presumption in favor of retention, rebutted if a judge "invents" rather than "interprets" law); Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections*

the ordinary voter—a presumptively reasonable, well-read, and intelligent voter to be sure, but not necessarily a reader of articles in law reviews.

It seems clear that we would advise voters to not evaluate judges simply on the basis of whether they approve or disapprove of results which the judges have reached in particular cases, or in particular categories of cases, as they might when evaluating a candidate for legislative office.<sup>27</sup> This follows from our recognition that there are cases in which we expect judges, by applying legal norms they are bound to accept, to reach results which, as a matter of policy, they may also disapprove. To use the franchise to remove from office judges who are doing their jobs in this fashion would be more than unfair; it would be to reject the rule of law. I assume that is something we would not want to do.

A second possibility is for the voters to take into account what I have conceded to be an inevitable element of subjectivity in many judicial decisions and to base their votes upon an evaluation of that subjective element. The analysis would go something like this: most difficult cases involve some sort of value judgment for their resolution; there are limits on the extent to which such value judgments can be objective; to the extent that particular judges fill in that gap with value judgments that are personal to them, and contrary to the voters' own value judgments, they would be well advised to vote against those judges and hope that they will be replaced by someone whose value judgments are closer to their own.

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and the California Supreme Court: *Defining the Terms of the Debate*, 59 S. CAL. L. REV. 809, 828 (1986) (burden on opponents to demonstrate lack of "decisionmaker impartiality," or misuse of administrative authority); Moore, *Politics is Not the Basis for Judging the Judges*, L.A. Times, July 29, 1985, Part II, at 5, col. 1.

27. See Thompson, *supra* note 26 at 818-19. As Professor Thompson sees the issues, "[t]he threat that a judge may be unseated for an unpopular decision, regardless of the reasons counseling the unpopular result, creates improper pressure to reach a more popular result by ignoring the sounder rationale." *Id.* at 18. But cf. P. JOHNSON, *THE COURT ON TRIAL: THE CALIFORNIA JUDICIAL ELECTION OF 1986* (1985) (publication of the Supreme Court Project and the Foundation for Research in Economics and Education). According to Professor Johnson, lengthy terms and election procedures protect judges, and that is all the protection from public opinion that the people of California desire to afford. After all, "[e]lections make no sense as a means of evaluating technical competence of judges: that is the task of the professionals who participate in their appointment and confirmation." *Id.* at 3. Therefore, "the way the justices have chosen to employ their power is very much a legitimate issue in the election campaign, and . . . voters should not permit lawyers to evade serious discussions of the substantive issues by invoking platitudes about judicial independence and the dangers of politicization." *Id.* at 5. In particular, Professor Johnson saw the death penalty and legislative gerrymandering decisions as valid tools for the voter to use in evaluating the justices. *Id.* at 5-13.

This second criterion is, in principle, quite compatible with the model of adjudication that I have advanced. The only question is whether it is capable of reasoned application by voters. The problem lies in identifying the subjective element among the other elements in the decisional process. Occasionally an opinion will sufficiently reveal the judge's thought processes as to make such an identification possible, but not all opinions do this. If, for example, an opinion purports to find in the language or background of a statute some reflection of legislative purpose to support a particular interpretation, the possibility always exists that the reasoning is in whole or in part a rationalization, conscious or otherwise, for the deeply felt views of one or more of the signatories. Whether or not this is true in a particular case of a particular judge, however, is not likely to be an easy matter to determine for the judge who wrote the opinion, much less for a casual observer.

A third possibility exists: the voter could apply some more objective sort of evaluation which does not depend upon being able to get into the judge's mind. A variety of criteria might fit this description. For example, one might attempt to evaluate the judge's attitude toward precedent or toward the legislative branch. These criteria would involve judgments such as: "This judge persists in overturning precedent, or in holding statutes unconstitutional, or in developing new common law doctrine, under circumstances in which a less 'activist' judge would, and should, defer to the principles of *stare decisis*, or legislative supremacy." Or, alternatively, "This judge is overly deferential to precedent and the legislature, failing to assume responsibility for difficult decisions which 'better' judges would find to be strongly supported by changed circumstances, or persuasive policy reasons."

Similarly, and within the same category of "objective" factors, one might attempt to evaluate the judge's judgment as to how far decisions should reach. One might say, for example, "This judge is constantly reaching out to decide issues that are not squarely presented for decision that a wiser judge would not reach," or "This judge is constantly seeking to confine the decisions so narrowly that it is of no help to practicing lawyers in advising their clients." On a more technical level, one might attempt to evaluate the judge's scholarship, use of judgment, integrity in relating the opinion to the record, or ability to set forth a comprehensible justification for the result.

These third category criteria, like the second category, are in principle compatible with the view of the judging process that I have postulated, and they avoid the difficulties inherent in trying to probe the

judge's mental states. They do, however, present other problems. For one thing, they assume that the voter is highly aware of the details of a judge's work and is familiar with the context in which evaluation is to be made; that is, the voter is familiar with the relevant statutes and case law, legislative and constitutional history, academic commentary, the practices of other judges, and the like. Even after all of that information is accumulated, these criteria are themselves so highly subjective that reasonable lawyers and judges are likely to differ over their application.

The problems that I have mentioned are no different in nature or degree than the problems presented by other sorts of decisions which voters are sometimes called upon to make through the ballot. Some initiative measures, after all, are exceedingly complex and capable of being understood only by persons with special training or extraordinary diligence, but we do not shrink as voters on that account from making the best judgment we are capable of making. Is there anything peculiar to a judicial retention election which calls for a different approach? I think there is.<sup>28</sup>

#### IV

A peculiar and delicate relationship exists between the judicial function and the democratic process. We accept, in a way that is distinctive from our attitudes toward other branches of government, that it is part of the courts' job to render decisions which may be unpopular. Although this is particularly true in the constitutional arena when the court may be called upon to consider claims of constitutional rights by unpopular persons or causes, it can also be true in other arenas in which there is a divergence between what the court sees as its obligation to legal principle and the popular will.

Utilization of the first category of criteria—whether voters do or do not like the results in particular cases—would obviously threaten this relationship. It would create an atmosphere in which judges, if they wished to retain their seats, would have a powerful incentive to conform their decisions to the tides of public opinion. The second and third categories of criteria, based upon subjective or theoretically objective factors in the judging process, would avoid that result to the extent that they were capable of being applied in such a way as to distinguish them from the first category.

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28. Professor Moore agrees. "Judgeships are not like ordinary political offices. Judges need insulation from popular pressure, even when that pressure is exerted through the ballot box." Moore, *supra* note 26.

Our experience with judicial elections demonstrates, however, that these criteria are not capable of being applied with that degree of precision. That experience teaches us, on the contrary, that whatever the applicable criteria are said to be, the voters tend to cast their ballots on the basis of whether or not they like the results in the cases that the judge has decided.<sup>29</sup> This is the standard with which voters are most familiar; it is the easiest standard on which to posit thirty-second television spots; it is also the easiest standard for voters to apply, the others being so esoteric and difficult to apply as to be unworkable.

The 1986 election campaign, with its emphasis upon results in death penalty cases, clearly demonstrated this phenomenon.<sup>30</sup> The message which this phenomenon sends to judges is that if they want to avoid negative votes, it is best to produce results with which the voters will agree. The risk that judges will receive and act upon that message, unconsciously if not consciously, is substantial. Justice Otto Kaus, my former colleague on the California Supreme Court, has candidly stated in public that he cannot be sure whether his vote on an important case in 1982 may have been influenced subconsciously by his awareness that the outcome could affect his chances in the retention election being conducted that year.<sup>31</sup> I would have to say that the same is true of my votes in critical cases during 1986; I just can't be sure. In any event, the potential that the pendency or threat of a judicial election is likely to have for distorting the proper exercise of the judicial function is substantial, and palpable.

Moreover, whatever the effect of a pending election campaign might be upon judicial decisions, the public perception of effect is inevitable and unavoidable. For example, during the 1986 campaign the court filed an opinion affirming the imposition of the death penalty which I wrote and Justice Reynoso, who was also on the ballot, signed.<sup>32</sup> The opposition group immediately called a press conference to charge that the two of us acted as we did only for political reasons. I know of no effective way to refute that kind of allegation.

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29. An examination of the 1986 California retention data led to the conclusion that Californians were almost exclusively concerned with the substance of the judge's decisions, particularly in death penalty cases and criminal cases.

30. A Field exit poll asked voters the question, "Why did you vote NO on the Rose Bird confirmation?" Sixty-six percent said it was because she was "too lenient, too soft on crime." Sixty-four percent said it was because they "did not like her position on the death penalty." See S.F. Chron., Nov. 5, 1986, at 1B, col. 1.

31. L. A. Times, Sept. 28, 1986, Part I, at 23, col. 3.

32. *People v. Rodriguez*, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986).

These are the special risks to the integrity of the courts and the judicial function that are likely to be posed by a judicial election campaign that is conducted in accordance with the premise that judges are nothing but politicians running for office. Is there any way to have elections and avoid that risk? I am dubious. So long as there is money to be made in election campaigns by professional consultants, and so long as the thirty second television spot continues to be the most effective means of communicating campaign arguments, any prospect of debates focused on appropriate criteria seems unlikely.

If this looks like an argument for doing away with judicial elections altogether, I plead guilty. In fact, there is an additional danger in judicial elections which disturbs me almost as much as the danger I have been discussing. In the 1986 election campaign, committees created by or on behalf of the three judges targeted by the opposition raised approximately four and one-half million dollars in their defense.<sup>33</sup> The opposition raised approximately seven million, not including amounts spent by political candidates who found it to their advantage to include an anti-Rose Bird message in their media campaigns.<sup>34</sup> Much of this money, on both sides, was collected from lawyers and from organizations, such as labor unions or insurance companies, which have an obvious stake in the decisional process. Some of the contributions to the candidates' campaigns were solicited by the candidates themselves. All of the contributions, with identification of the contributors, were required by state law to be reported.<sup>35</sup> As a consequence, the candidates were bound by law to know who did, and by process of elimination who did not, contribute to their campaigns; conversely, each candidate could discover, through examination of public reports, who contributed to the opposition.

I would like to think that judges worthy of their robes would not be influenced by such mundane considerations, but how do we know? Certainly, the appearance of impropriety exists. In Texas, members of the Supreme Court are elected. As that court met to consider Texaco's appeal from the ten billion dollar judgment which had been rendered in favor of Pennzoil,<sup>36</sup> they heard from lawyers on both sides who had contributed heavily to their campaigns. As it happened, Pennzoil's lawyers had contributed approximately \$315,000 to Texaco's mere \$72,700.<sup>37</sup> A professor at the University of Texas has defended the system by saying:

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33. Reports on file with the California Fair Political Practices Commission.

34. *Id.*

35. *Id.*

36. *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. Civ. App. 1987).

37. Kaplan, *Justice For Sale*, COMMON CAUSE, May/June 1987, at 28.

"You use your resources to elect legislators favorable to your position; it's no different than electing judges favorable to your position."<sup>38</sup> I have attempted to show that there is a difference, and that the difference is critical to our conception of the judicial function. The courts are one place in our political system where citizens should be entitled to expect a commitment to principles that are not for sale.

It may be time to rethink the role of judicial elections. If we are to do that, we need to consider what it means to say that we need elections to hold state judges "accountable." Those who are concerned with the tension between the principles of judicial independence and majority rule typically focus upon the United States Supreme Court and its function of judicial review. When that Court declares a statute unconstitutional, and thereby defeats what we presume to be the will of the majority, on the constitutional issue its decision is for all practical purposes the last word until the composition of the Court changes. The prospect of changing the Constitution to overrule the Court's interpretation is remote. However, in the state systems, the situation is quite different. Whatever the state courts say about the federal constitution, or federal statutes, is subject to review by the U.S. Supreme Court. Whatever they say about state statutes, or the common law, is subject to revision by the state legislature. And whatever they say about the state constitution is subject to an amendment process which by comparison is relatively easy. In states like California, the constitution can be amended by simple majority vote on a ballot initiative, and recent history contains several examples of the voters exercising that authority to change judicial interpretations.<sup>39</sup>

I am not suggesting that this is a complete answer to the question of accountability. It takes time and determination for the legislature to react to a court decision, and it may be a politically difficult thing to do. Similarly, if the legislature refuses to react, it takes a good deal of resources to place an initiative on the ballot. However, those procedures are part of our state systems, and if we are making an honest appraisal we ought not to leave them out of the analysis.

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38. *Id.*

39. For example, the voters have "overruled" California Supreme Court decisions in such areas as: school busing to remedy discrimination (Proposition 1 (1979), adding CAL. CONST. art. I, § 7 "overruling" *Tinsley v. Superior Court*, 150 Cal. App. 3d 90, 197 Cal. Rptr. 643 (1983)); the state's exclusionary rule to the extent that it is different from the federal rule (Proposition 8 (1982), adding CAL. CONST. art. I, § 28(d) "overruling" *In re Lanc W.*, 37 Cal. 3d 873, 210 Cal. Rptr. 631, 694 P.2d 744 (1985)); and the death penalty (see *People v. Frierson*, 25 Cal. 3d 142, 158 Cal. Rptr. 281, 599 P.2d 587 (1979), summarizing the court decisions which invalidated, and the subsequent legislative enactments which validated, the death penalty in California).



In addition, if we were undertaking the open-minded reappraisal that I suggest, we would need to consider whether there are alternatives to the election system that would produce a better balance between our desire for accountability and the need for judicial independence. If, for example, we consider that a person's background and values deserve public scrutiny somewhere in the process, we may want to focus that scrutiny at the appointment stage through procedures for selection and confirmation, rather than through the ballot on the basis of the judge's decisional record. If we consider the risk of lifetime appointments to be too great in the state system, even though we accept that risk in the federal system, we may want to adopt an alternative model, as New York has done for its Court of Appeal, giving judges a fixed but substantial term.

The political reality, no doubt, is that we will continue to have elections for some time. On that assumption, what are the implications of my observations concerning the appropriate criteria and the risks entailed? They are, I think, that we — and by that I mean to include lawyers, professors, judges, editorial writers, and others who may be in a position to influence public opinion — should undertake to develop a consensus of constraint. In light of the very substantial difficulties and risks inherent in the application of even theoretically appropriate criteria, we should advocate a presumption favoring the tenure of an incumbent judge so that the burden is upon those who would challenge that tenure to demonstrate, by clear and convincing evidence, that the judge has failed in some significant respect to behave in the manner in which we expect a competent and fair-minded judge to behave. That we may regard a judge as too “liberal” or too “conservative” ought not be sufficient unless we are convinced that the judge's view of the law and its relationship to society is so extreme that it lies outside the mainstream of legal thought and community values. I realize that the standard is vague, and capable of manipulation, but I can think of no better way to convey the limited scope of the appraisal appropriate to a judicial election if we are to preserve the integrity of the courts.

